

Exhibit 1

Pages 1 - 64

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE JUDGE

IN RE: FACEBOOK, INC. CONSUMER)
PRIVACY USER PROFILE LITIGATION.) NO. 18-MD-2843 VC (JSC)
San Francisco, California
Monday, July 13, 2020

TRANSCRIPT OF ZOOM VIDEOCONFERENCE PROCEEDINGS

APPEARANCES:

For Plaintiffs:

BLEICHMAR FONTI & AULD LLP
555 12th Street
Suite 1600
Oakland, California 94607
BY: LESLEY E. WEAVER, ESQ.
ANNE K. DAVIS, ESQ.
MATTHEW MONTGOMERY, ESQ.

KELLER RORHBACK, LLP
1201 Third Avenue
Suite 3200
Seattle, Washington 98101
BY: DEREK W. LOESER, ESQ.
DAVID J. KO, ESQ.
CARI C. LAUFENBERG, ESQ.

GIRARD SHARP LLP
601 California Street
Suite 1400
San Francisco, California 94108
BY: ANGELICA M. ORNELAS, ESQ.

Reported By: **BELLE BALL, CSR 8785, CRR, RDR**
Official Reporter, U.S. District Court

(Appearances continued, next page)

APPEARANCES, CONTINUED:

For Defendants:

GIBSON DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
BY: ORIN SNYDER, ESQ.

GIBSON DUNN & CRUTCHER LLP
1881 Page Mill Road
Palo Alto, California 94304
BY: MARTIE P. KUTSCHER CLARK, ESQ.

GIBSON DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, Texas 75201
BY: RUSSELL H. FALCONER, ESQ.

GIBSON DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
BY: DEBORAH L. STEIN, ESQ.

Monday - July 13, 2020

8:32 a.m.

P R O C E E D I N G S

THE COURT: Calling Civil Action 18-2842, In Re Facebook. Counsel, starting with plaintiff, please state your appearances.

MR. LOESER: Good morning. It's Derek Loeser for plaintiffs.

THE COURT: Good morning.

MS. WEAVER: Good morning, Your Honor. Leslie Weaver with BFA. Anne Davis and Angelica Ornelas are with me.

THE COURT: Good morning.

MR. KO: Good morning, Your Honor. David Ko, Keller Rohrbach, also on behalf of plaintiffs.

MS. LAUFENBERG: And good morning, Your Honor. Cari Laufenberg on behalf of plaintiffs.

THE COURT: Good morning. So, for Facebook?

MS. STEIN: Good morning, Your Honor. I saw Orin Snyder's name up a moment ago, but it looks like he's no longer on this screen.

THE CLERK: I promoted him, and I don't see him.

MS. STEIN: I'm getting text messages saying there is a little bit of a technical error, but I think he'll be on momentarily.

THE CLERK: Okay.

MS. STEIN: Yeah. He says it says "Waiting."

1 And, this is Deborah Stein for Facebook. And I'm here
2 with Martie Kutscher Clark. And hopefully Orin Snyder will be
3 here in a moment. I'm not sure; maybe he should disconnect and
4 try again.

5 Do you think that's the best thing, for him to hang up and
6 try again?

7 **THE CLERK:** Sure. I mean, as soon as I see his name,
8 I will promote him to a panelist.

9 **THE COURT:** No apologies needed.

10 (Off-the-Record discussion)

11 (A pause in the proceedings)

12 **MR. SNYDER:** (Inaudible)

13 **THE COURT:** Can't hear you, Mr. Snyder.

14 **MR. SNYDER:** Okay. I apologize. My iPad was not
15 allowing me to connect, so now I'm on my iPhone.

16 **THE COURT:** We can see you now.

17 **MR. SNYDER:** Okay. Great. Thank you so much. I
18 apologize. I don't know why.

19 **THE COURT:** Not a problem. Not a problem. Why don't
20 you go ahead and make your appearance; everyone else has.

21 **MR. SNYDER:** Okay. Orin Snyder for defendants, from
22 Gibson Dunn. Thank Your Honor.

23 **THE COURT:** We do have a court reporter this morning,
24 taking down the transcript.

25 All right. So thank you very much, everyone, for your

1 statements. I thought we should just discuss them, the issues,
2 in the order the parties presented them.

3 First, with respect to plaintiffs' document production.
4 Not really sure, plaintiffs say they're not withholding
5 anything.

6 The only thing I guess that Facebook raised was some
7 potential dispute regarding the production of documents versus,
8 maybe, interrogatories. But I didn't understand plaintiffs'
9 statement to say that they were refusing to produce those
10 documents.

11 I don't know if anyone from the plaintiffs wants to
12 respond.

13 **MS. WEAVER:** Angelica Ornelas will be addressing this
14 for us, Your Honor.

15 **MS. ORNELAS:** Thank Your Honor.

16 So I think what we've tried to do here is explain that we
17 are searching for responsive materials, to the extent that they
18 are in plaintiffs' possession.

19 What we are excluding from the search are materials from
20 the user account and user archive, itself, for a couple of
21 different reasons. One is as to the offensive ads that
22 Facebook is seeking, it's not clear that that content is
23 located within those sources, to begin with. There does appear
24 to be identification of advertisers that sent content to the
25 users. But the ads, themselves, do not appear to be in the

1 were harmed by it. Right?

2 **MR. LOESER:** Right.

3 **THE COURT:** Right? So that's sort of a chicken and
4 egg. So to say: Well, until we know who sent it -- no. You
5 made allegations in the complaint of some injury, thus far.

6 And they want to know, what is that based upon.

7 **MR. LOESER:** Right. I would --

8 **THE COURT:** Sounds like -- I don't know --

9 **MR. LOESER:** Yeah, I guess --

10 **THE COURT:** I don't know if I'd call it a contention
11 interrogatory so much as like: Identify for us, you alleged
12 X. Okay, who is -- who did the friend request come from?

13 **MR. LOESER:** Right. I guess I would describe it as
14 part of a chicken and an egg. Because they've focused on this
15 one aspect of the case which is, you know, ads that people
16 received that they found offensive.

17 But the heart of the case is they took information, user
18 data, and they shared it with third parties. That then led to
19 a variety of things. One of those things was ads that people
20 found offensive.

21 But the basis of the case is that they took data, and they
22 shared it without consent.

23 But I hear what you are saying.

24 **THE COURT:** Well, that's your argument to Judge
25 Chhabria. And I get it.

1 For example, let's assume hypothetically in 2012 there was
2 some app that did something that the investigation uncovered.
3 We then, as part of our investigative protocol, communicated
4 with that app. Call it App X. We wrote them a letter. That
5 letter will be produced and they will then have the name of
6 that app. And any communications with that app.

7 In one or two instances, only, we actually -- I think one,
8 maybe, we filed a lawsuit against a company. That is all
9 public.

10 After they review those documents, we can take -- we can
11 then meet and confer, and there can be a live dispute. Right
12 now, there is no live dispute other than they say they want
13 everything. And they are focusing on a Massachusetts Superior
14 Court ruling. And as we told the Court -- which -- which --
15 which was a motion to compel by the Massachusetts Attorney
16 General regarding a completely different -- substantially
17 different document requests than plaintiffs.

18 We objected to that request in Massachusetts because, as
19 framed, it did invade attorney/client privilege, work product,
20 and the like. The Superior Court ruled against us.

21 But Facebook took that up to the Supreme Judicial Court in
22 Massachusetts, and they granted the extraordinary review of the
23 Superior Court's work product determination. That is in
24 litigation. And so nothing that's happening in Massachusetts
25 should either bind or control here.

1 This is not right. When they get the tens of thousands of
2 documents they will see that there are -- I'm making it up --
3 ten, 20, 30, 40, 50 different apps -- maybe more, I don't know
4 the number -- maybe Martie does -- with which we communicated
5 as a result of our investigation. They'll know the names of
6 those apps. They can then follow up and ask questions about
7 those apps. We're going to turn over all those documents.

8 What we're not turning over is our law firm's files, and
9 our communications with our client that were all pursuant to
10 this privileged investigation.

11 **THE COURT:** When is that production going to be
12 complete?

13 **MR. SNYDER:** Martie?

14 **MS. KUTSCHER CLARK:** So we made a production on
15 Wednesday that included about 10,000 additional pages of
16 materials with the third parties. We're continuing to review
17 them. The volume is extraordinarily high, because it includes
18 every communication with apps about this investigation.

19 I think it would probably take us another several weeks to
20 work through the rest of the documents. I think it's in the
21 range of tens of thousands of additional documents to review.
22 And we're actively working on that.

23 But again, these include every letter that went to an app
24 saying they were suspended, and why. So once the production is
25 complete, plaintiffs will have the ability to identify any apps

1 that were suspended for reasons they're concerned about, or
2 that are actually relevant to the case.

3 And as Mr. Snyder said, then they could request additional
4 information about those apps, and we'd have something narrower
5 and more tailored that we can focus on.

6 **MR. KO:** Your Honor, this is David --

7 **MR. SNYDER:** Let me make one more point, Your Honor,
8 because -- so there's nothing -- there's no sort of nefarious
9 suggestion.

10 As it turns out, the vast majority of apps that were
11 suspended were suspended because we wrote them, saying: "Dear
12 Mr. or Mrs. App, we have these questions for you," and they
13 never wrote back. Probably out of business, or didn't care.

14 We then suspended them for non-compliance with our
15 platform rules because they simply ignored our initial inquiry.

16 So I think a high majority, if not in the nineties, high
17 nineties of the so-called suspended apps (Indicating quotation
18 marks) are just apps about which we had questions and followup.

19 And then they never wrote back to us, and we said "You're
20 suspended because you're a scofflaw, you didn't respond to us."

21 **MR. KO:** This is David Ko on behalf of plaintiffs.

22 May I respond?

23 **THE COURT:** Yes.

24 **MR. KO:** So I'm a bit surprised, first of all, that
25 Mr. Snyder says this issue is premature. We have been going

1 back and forth on this.

2 And as you know, in last hearing, you did direct Facebook
3 to try and get to a final position on this issue so that we
4 could actually brief it. We thought we came to some sort of
5 final position, as you can tell from what Mr. Snyder is saying.
6 He refuses to actually have a final position on this.

7 And on the communications in particular that they are
8 claiming they will produce to suggest that we should narrow our
9 subsequently -- subsequently narrow our request, that doesn't
10 make sense to us for a variety of reasons. Including, most
11 notably, the fact what they are offering to produce here are
12 internal communications with third parties. That has nothing
13 to do and has no bearing on the relevance of the internal
14 documents and communications that we are entitled to.

15 I understand what Mr. Snyder is saying, that there is a
16 certain degree of those communications that could be
17 privileged. But it is inconceivable that all of them are. And
18 all you have to do is take one look at the statement that we
19 attached or the exhibit that we attached to our statement that
20 shows their publicly-available announcement about this ADI in
21 which they claim -- Facebook claims -- that this is something
22 that involved hundreds of people. Not just attorneys. Right?

23 They don't say it's an employer-driven investigation.
24 They say this involved external investigators. They say it
25 involved policy groups at Facebook. They say it involved

1 engineers, hundreds of people that were involved in this
2 investigation. Platform operations folks. Developer
3 operations.

4 This resulted -- this investigation -- which is ongoing,
5 by the way -- has resulted in thousands, tens of thousands of
6 apps being suspended.

7 So even if Mr. Snyder is correct in saying that the vast
8 majority of them relate to some sort of investigation in which
9 third parties did not respond, you still have a substantial
10 amount of third parties that are potentially in violation of
11 Facebook's (Inaudible).

12 So --

13 **MR. SNYDER:** And -- and plaintiffs will get the names
14 of any -- plaintiffs will get any communications that we had
15 with any third-party app which puts them on notice of either a
16 perceived, suspected or actual violation. They will have,
17 chapter and verse, the names, serial numbers, addresses of
18 those apps.

19 **MR. KO:** Yeah.

20 **MR. SNYDER:** And the fact is, yes -- the fact is this
21 was a large investigation, because the company committed to
22 conduct a retrospective investigation to see if there was a,
23 quote, "another Cambridge Analytica out there," close quote.
24 Turns out there wasn't.

25 Having said that, it takes a lot of engineers and a lot of

1 people at the company, and a lot of lawyers, I might say. It
2 wasn't just Mr. Southwell. We had a big team of lawyers
3 working with a big team at Facebook to look prior to 2015 at
4 every single third-party app to determine which ones complied,
5 and which ones didn't.

6 And the plaintiffs are going to have a cornucopia of
7 information about third-party apps. And I just would
8 respectfully suggest that they be a little patient.

9 As Martie said, we're going to complete the production.
10 And I assume they'll have a lot of questions to ask about those
11 apps, and a lot of work to do to follow up. And we will follow
12 up with respect to any third-party communications with those
13 apps.

14 So --

15 **MR. KO:** The fundamental disconnect is, so,
16 Mr. Snyder is basically suggesting that we just received this
17 information, right, about external communications that they
18 had with third parties, and a potential list of these apps.

19 We are entitled to much more. This is discovery related
20 to our case that is fundamentally about Facebook allowing
21 third-party app developers to misuse and abuse it. Information
22 of user content information.

23 External communications with third party developers is one
24 tranche of that. Right? Internal documents and communications
25 related to their analysis from non-attorneys that are not

1 privileged are obviously relevant and responsive to our
2 requests regarding their enforcement policies. And so that's
3 what we're asking.

4 And that's what the disconnect is here, Your Honor.

5 **THE COURT:** So is it Facebook's position that, for
6 example, any communications among engineers that didn't
7 involve attorneys, because they all come under the umbrella of
8 this lawyer-directed investigation, they're privileged?

9 **MR. SNYDER:** Your Honor, the engineers were all
10 working. There were internal legal teams, external legal
11 teams. And everything that was done within the rubric of this
12 investigation is at the direction of counsel.

13 Let me make another point though, Your Honor, just to be
14 clear --

15 **THE COURT:** So that's --

16 **MR. SNYDER:** Yes. Yes.

17 **THE COURT:** I just want know if that's a yes.

18 **MR. SNYDER:** Yes, yes.

19 **THE COURT:** All right. So --

20 **MR. SNYDER:** But Your Honor, here's what plaintiffs
21 have failed to mention.

22 This so-called "ADI," which is really an internal legal
23 investigation, is separate and apart from Facebook's normal and
24 regular enforcement activities.

25 Facebook has an enforcement team. And all it does is

1 enforce the rules and regulations and policies on the platform.
2 That enforcement team works with engineers on a regular basis,
3 and -- and is not done at the -- in the ordinary course, under
4 the direction of counsel.

5 And we have produced and will produce numerous documents,
6 because plaintiffs have asked for them, concerning our ordinary
7 enforcement activities which do involve engineers and policy
8 people. And that stands in sharp contrast to the legal
9 investigation that my firm conducted.

10 And so -- and Martie, I don't know what the volume of
11 those documents are, but they are fairly voluminous.

12 **THE COURT:** Okay. But what I guess I don't
13 understand, at some point you're going to have to produce a
14 privilege log. Because just because you say they're
15 privileged doesn't mean that the plaintiffs have to accept
16 that.

17 So I'm trying -- so when -- when do you intend to do that?

18 **MS. KUTSCHER CLARK:** If I could respond briefly,
19 because I think there's a little bit of a misunderstanding
20 here.

21 The concern we're having at the moment is the requests
22 we're receiving from plaintiffs keeps changing. When we came
23 before the Court last time, we were under the impression that
24 the plaintiffs were seeking the materials that the
25 Massachusetts AG'd requested. So we went back and we talked to

1 the plaintiffs about our position as to those materials.

2 During that discussion, the plaintiffs told us for the
3 first time -- or at least we understood for the first time --
4 that they are seeking every single document from the
5 investigation, about the investigation, related to the
6 investigation. That's a really different request, and it's
7 extraordinarily broad.

8 And our position with respect to privilege and whether and
9 to what extent we could prepare a privilege log is very
10 difficult to analyze when we're talking about every single
11 document. It would be a privilege log with millions and
12 millions of entries. So what we're suggesting right now is
13 that we finish producing the letters that show who was
14 suspended, and why, so that the plaintiffs can make a more
15 tailored request.

16 And at that point, we're not necessarily objecting to
17 producing any of the underlying information. So for instance,
18 what we understand the plaintiffs ultimately want is underlying
19 data showing platform violations, or showing what an app did
20 with users' data.

21 To the extent that we can uncover that underlying data,
22 we're not objecting to digging up that data and providing it to
23 plaintiffs so that they can do their own analysis. What we're
24 objecting to doing is taking our attorney files and the work
25 that our attorneys and attorney-led team did to look at that

1 data, and analyze it, and make decisions about that data, and
2 simply handing it over to the plaintiffs.

3 **MR. LOESER:** Your Honor, if I may, just briefly.
4 Because again, I think your question went right to the heart
5 of the matter.

6 If we have two engineers talking about Facebook's data
7 policies in connection and then fallout from Cambridge
8 Analytica, can that possibly be privileged. And I think the
9 reason why we feel like this controversy is ready to be
10 briefed, the parties are taking positions that are directly
11 contrary on a large body of information that we believe is
12 directly relevant.

13 If you go to the exhibit we provided, which is Facebook's
14 public announcement of the ADI investigation, this does not say
15 Gibson Dunn lawyers are conducting an internal investigation
16 for the purpose of legal advice.

17 And I'll just read what it says, because I think it should
18 give a pretty good idea --

19 **THE COURT:** No, I understand. But you're not
20 seeking, are you, like, memos among Gibson Dunn attorneys.

21 **MR. LOESER:** No. No. We are not seeking privileged
22 information. We're seeking --

23 **THE COURT:** Okay.

24 **MR. LOESER:** Yeah. We want the information -- like,
25 for example, one of the categories of people involved, from

1 their announcement, they say: Among the people involved in
2 this are policy specialists.

3 They say (As read):

4 "We promised that we would review all of the apps
5 that had access to large amounts of information
6 before we changed our platform policies in 2014. It
7 has involved hundreds of people: attorneys, external
8 investigators, data scientists, engineers, policy
9 specialists, platform partners and other teams across
10 the country."

11 And the next line is really critical for this.

12 "Our review helps us to better understand patterns of
13 abuse in order to root out bad actors among
14 developers."

15 That is a business activity, and it is a critical business
16 activity for this case. We are not interested in the legal
17 advice and the legal communications. We want the business
18 activity information that would be produced because it's
19 directly relevant and responsive. If they want to withhold it,
20 they need to log it. But it's certainly not going to be
21 privileged.

22 **MR. SNYDER:** Well, we strongly, respectfully
23 disagree, because my law firm was involved in every decision.

24 **THE COURT:** Okay, but we're not going to adjudicate
25 that now.

1 **MR. SNYDER:** Right.

2 **THE COURT:** The question, though, because it's not --
3 so they're not seeking the stuff that's clearly privileged, so
4 you don't have to worry about that. And I don't even think
5 that ever really even needs to be logged, because that would
6 be a waste of time.

7 But with respect to the other stuff, there's arguments
8 there. Both ways. Privilege is not clear, and there's
9 arguments both ways.

10 And so the question is then, how, how -- I certainly --
11 it's not -- I can't adjudicate that right now, like just
12 generally out there. It has to be done in context. Right?

13 So maybe the thing to do -- I do, I have to say, I just
14 think, Mr. Loeser, I understand, but we're not in a great rush,
15 you noticed, so -- is start reviewing those documents, and then
16 see -- we can take a subset. Because the way I'm going to be
17 able to adjudicate this is take some exemplars, and rule, and
18 then the parties then can use that and apply it. Right? You
19 don't need the log of every single document.

20 So maybe what you do is you take a particular app, or you
21 get some names or something, right, and we focus on that
22 subset, and I adjudicate that. That's not going to resolve the
23 privilege for everything, but it will be a roadmap that the
24 parties can then apply. But I think we are going to need a
25 certain set -- I want it to be in context of a particular

1 document. So the question is: How do we get there.

2 And I don't think we necessarily need to wait until all
3 the production is done. I don't think that is the case. The
4 parties should get together and decide on, you know -- I don't
5 know what it is that the plaintiffs think necessarily are
6 there. Maybe Facebook can come up with -- I don't know -- a
7 hundred documents that you're going to log.

8 **MR. SNYDER:** We can also be helpful, Your Honor.

9 And, and -- because the vast majority -- I think it's
10 99 percent, but that's just from what my partner, you know,
11 has allowed to.

12 Since the vast majority are people we wrote to and
13 suspended because they didn't write back to us, you know, maybe
14 we can highlight a couple of ones where we had further
15 activity, they wrote back to us, we engage with them.

16 And then we can go behind the curtain, so to speak, on
17 your exemplar idea, and we can take a look at what our work
18 product and attorney/client activity was behind the contain,
19 look at what engineers were doing, and then figure out how to
20 tee up a privilege exemplar for handful of apps.

21 **THE COURT:** Well, and for example, Mr. Loeser brought
22 up like policy (audio interference), things like that. That's
23 not going to be particular to an app.

24 But maybe plaintiffs can point out, you know, because
25 what's --

1 **MR. LOESER:** Your Honor, you're breaking up on us.

2 (Off-the-Record discussion)

3 (A pause in the proceedings)

4 **THE COURT:** I'm back.

5 **MR. LOESER:** We lost you right when you started
6 talking about policy specialists.

7 **THE COURT:** I came to the courthouse so I'd have good
8 internet. I got the Court give me an upgraded laptop, and
9 it's, like, worse than ever. I'm actually at the courthouse,
10 where there's very few people here.

11 In any event. So, you know, I think, you know,
12 plaintiffs -- maybe starting with this -- identify some
13 documents that you think that you would be entitled to. Like
14 discussions among the policymakers that Facebook was referring
15 to.

16 Facebook then, you know, look at them, and just say: Oh,
17 no, yeah, I can produce those now.

18 But I think we're just going to have to do it sort of in
19 tranches. But I agree with the plaintiffs, I don't think we
20 need to wait until the end because I don't think it is
21 necessarily specific to particular apps.

22 I think this suggests there's broader things going on that
23 would be relevant, and that may very well not be privileged.
24 But I don't think there's anything right now. I --

25 **MR. SNYDER:** The reason that makes sense, Your Honor,

1 is that, you know, without reviewing attorney/client
2 privileges, we did have an internal protocol for this internal
3 investigation. Sort of an escalation protocol. And so things
4 did follow a particular prescribed course in the investigation
5 of an app. And it was a massive undertaking, because the
6 company had to literally evaluate every app prior to 2015.
7 And so there is an established protocol that governs
8 escalation of these app investigations. And policy was
9 involved in some of those.

10 But I think we -- we can work with plaintiffs, I think,
11 and identify our own protocol for how to frame the privilege
12 inquiry, and then key it up for Your Honor when it's ripe.

13 **MR. LOESER:** Well, Your Honor, for the exemplar
14 approach to work, it would need to be -- let's take policy
15 specialists, for example. We would say: Look, we want -- and
16 I don't know if there's a way for us to connect it to some
17 particular app or not; it depends on what other discovery we
18 got. But we want all the conversations and discussions that
19 relate to -- in which policy specialists were involved.

20 For the exemplar to work, Facebook would then need to
21 provide that, or produce a log that identifies everything that
22 they're not providing. It can't be some cherrypicked set of a
23 couple of documents here and there that try to somehow prove
24 the point that Orin's trying to make. It needs to provide the
25 parties with the full ambit of the information, so that we can

1 then meaningfully brief the dispute.

2 **THE COURT:** So of the --

3 **MS. STEIN:** It sounds like we have our work cut out
4 for us on a meet-and-confer, Your Honor. I mean, this is one
5 of the issues that we've been trying to focus plaintiffs on,
6 which is the over-breadth of the request. And we've been
7 trying to discuss: What do you actually want?

8 And so I think this will help give us some structure for a
9 meet-and-confer process, so that we can get a better sense as
10 to what plaintiffs are looking for.

11 **THE COURT:** Well, they actually do want everything.
12 They do want everything.

13 **MR. SNYDER:** Yes.

14 **THE COURT:** They recognize there are certain things
15 that they can't get, because of privilege. But the thing is
16 that there's a fine line in these types of things, what is
17 privileged and what's not privileged. And so, yeah. So what
18 they want is everything. That is true. But they recognize
19 there's some things they can't get.

20 But maybe it's to take it off in chunks. Maybe, you know,
21 start with the policy stuff. But that's going to take some
22 work, then, reviewing it, saying: Well, maybe we can't really
23 defend privilege here.

24 Or if you're going to log it all, then log it all, and
25 we'll make a decision. I think you probably can approach it

1 that way.

2 **MR. KO:** Your Honor, David Ko --

3 **MR. SNYDER:** Yeah, the problem --

4 **MR. KO:** Just one -- one more point to make in
5 response to what both Mr. Snyder and Mr. Stein have been
6 saying.

7 So, the exemplar approach and the sample documents.
8 Again, all that they are offering to produce to us are external
9 communications and (audio interference) with third parties.

10 As Mr. Loeser was indicating, there are a whole swath of
11 documents related to internal documents and communications
12 regarding their analysis, right, that may not have escalated to
13 the point of notifying a third party regarding this escalation
14 protocol that Mr. Snyder alludes to. Right?

15 And so there are a wide range of categories of documents
16 that we are entitled to, based on our discovery requests.

17 **THE COURT:** No, Mr. Ko, I understand. I'm not
18 limiting it. What I'm saying is, there's no way I can resolve
19 this, just on a general thing. It has to be specific. Some
20 things may be privileged, and some things not.

21 I'm trying to figure out -- if there are millions of
22 things, I'm just saying let's just take it in pieces.

23 **MR. KO:** Sure.

24 **THE COURT:** So start with what you want, most
25 important, what you think is the most yield, or what you think

1 would be the best exemplar for me to rule on. What area.

2 Like --

3 **MR. KO:** Yeah, and here's an example of --

4 **THE COURT:** Not waiving your right to get everything
5 else.

6 **MR. KO:** Sure. And I understand that, Your Honor.

7 And here is an example for why this issue is, to a certain
8 extent, ripe. You know, in addition to the policy specialists
9 that Mr. Loeser alluded to, the app -- the ADI very clearly
10 involved external investigators. So there are documents that,
11 by their own very nature, they've presumably waived the
12 privilege.

13 So communications --

14 **THE COURT:** Well, that's -- I don't accept that
15 statement, at all. That is way too simplistic.

16 **MR. SNYDER:** Our law firm --

17 **THE COURT:** Uh-uh, I don't need to do that. That is
18 not a correct statement of the law, Mr. Ko, that just because
19 an external -- if the external investigator was hired by
20 Gibson & Dunn, it may very well be privileged.

21 So anyway --

22 **MR. KO:** That's fair, you are absolutely correct.
23 All I'm saying is, in response to that statement, they're
24 identifying a categorical privilege and assertion over all
25 these documents, excluding this narrow category of documents

1 that they claim they're going to produce regarding
2 communications with third-party app developers. So it kind of
3 runs both ways is all I'm saying, Your Honor.

4 **MS. WEAVER:** Your Honor, if I may, I think we heard
5 an offer from Mr. Snyder that we had not previously heard.
6 And we actually started this discussion months ago by asking
7 about the escalation process. So, if we got a deadline for
8 Facebook to send to us the documents sufficient to describe
9 the escalation process, we might be able to identify
10 categories.

11 We're a little constrained, because we don't know, really,
12 what to ask for. We would only be working off experience in
13 other cases about how investigations were run, and we know that
14 Facebook is really specialized. So we don't have a lot of
15 insight, really, into how it was run. Certainly prior to, you
16 know, 2018. We know about their communications with third
17 parties because we've seen them, both in the public domain and
18 documents that we've received here.

19 But I think getting a description from Facebook about:
20 These are the teams, this is who did what, something like that
21 by a certain date within a reasonable amount of time, then we
22 can dig in and make a proposal about: These are the test
23 categories we want. If that's the direction Your Honor wants
24 to go in.

25 **MR. SNYDER:** Your Honor, that is all privileged,

1 which is why I say, without waiving privilege, I was simply
2 saying that we can't -- we had engineers, we had outside
3 consultants, we had lawyers, we had policy people all working
4 together to investigate every app on the platform prior to
5 2015.

6 And you know, if we meet and confer and they asked us
7 about those consultants, I would say Gibson Dunn hired them.
8 And they all were Covelled (phonetic), and they're all working
9 within -- at the direction of counsel. But --

10 **MS. WEAVER:** Well, if I may, this is where we begin
11 to get confused. Because if they are categorically saying
12 everything is privileged, then maybe we should brief that.
13 That can't be right.

14 So I don't know what we have to do to --

15 **THE COURT:** I agree.

16 **MS. WEAVER:** Yeah.

17 **THE COURT:** I doubt that that's correct. But a lot
18 of it may be, and a lot of it may not. So to brief it gets us
19 nowhere, unless we do it in context. That's all.

20 **MS. WEAVER:** So how can we develop an understanding?
21 As plaintiffs, to understand how these things are reviewed,
22 I'm a bit stymied.

23 **THE COURT:** Well, I think we start with something.
24 Like, we start with something.

25 **MR. SNYDER:** I think the judge had a great idea.

1 **THE COURT:** Focus on something. They produce a log,
2 and then, and then we -- we -- we -- I rule on that. Right?
3 So we start with --

4 **MS. WEAVER:** But I'm concerned, Your Honor, that
5 they'll cherry-pick only privileges communications between
6 lawyers and --

7 **MR. SNYDER:** No. No, we have an obligation --

8 **MS. WEAVER:** -- get to the heart of the issue --

9 **MR. SNYDER:** We have an ob- --

10 (Reporter interruption)

11 **MR. SNYDER:** Your Honor --

12 **MS. WEAVER:** My apologies.

13 **THE COURT:** So this is what you do. You start
14 with -- ask for communications among policy people, that no
15 lawyers were on. Just start with that. You ask for that.
16 Right?

17 **MR. SNYDER:** Or another --

18 **THE COURT:** Or ask for communications among the
19 external investigators, which no lawyers were on.

20 In other words, that's, right, going to be your Backs
21 (phonetic) case. So start by asking for those.

22 **MR. SNYDER:** I thought, Judge, you had an excellent
23 idea. Let's say there's App X that we had correspondence
24 with, and it's in those 16,000 pages. And we have back and
25 forth with an app about some platform violation.

1 They can then ask us with respect to that particular app
2 and -- and engagement with that app, what is behind the
3 curtain? You know, who else communicated at Facebook before
4 you sent that? And we can look at those documents, and
5 determine what's privileged and what's not.

6 And if we make a categorical privilege claim with respect
7 to everything so-called "behind the curtain," that could be
8 teed up for Your Honor because that would be illustrative of an
9 approach to a particular app enforcement that grows out of the
10 legal investigation.

11 **MR. LOESER:** And Your Honor, I think, again, for this
12 to work -- and this is Derek Loeser speaking -- we will come
13 up with a couple categories that we will choose.

14 They may not be the categories that Mr. Snyder would like
15 us to choose, but they will be the categories that we think
16 will show as best we can, when we don't have the information
17 when we are making the choices, why there is a problem with the
18 approach that they're taking.

19 **MR. SNYDER:** And I just want to warn everyone or
20 caution everyone, this was a massive investigation because the
21 CEO committed to Congress and the public that he was going to
22 direct this investigation.

23 So if you ask, just as a caution -- narrate, no -- for
24 every communication between consultants and among consultants,
25 that will be probably tens of millions of communications.

1 Because every time we told a consultant to do something with
2 respect to an app, and it was always a legal direction, the --
3 the consultants didn't direct the investigation, I imagine that
4 the consultants then went off into consultant-land and
5 exchanged 10 million emails before they came back with the work
6 product, brought it to counsel, and then a decision was made.

7 So the volume here is -- we should look at the volume. My
8 guess is we're talking about many tens of millions of
9 documents.

10 **MR. LOESER:** Well, Your Honor, we haven't received
11 many millions of anything. But I think a lot of what
12 Mr. Snyder just said sort of highlights the problems and the
13 reasons why I think this will result in briefing.

14 For one, maybe we'll start as a category the
15 communications between the CEO and the data policy people. And
16 this is -- I mean, everything you'll read about this from their
17 public statements, this is a very public activity that Facebook
18 has done. And it's very important, clearly, to get this
19 information about this investigation to its users. That's why
20 they keep posting about it.

21 We can come up with some categories that we think will
22 make clear to the Court what the problem is and where the
23 limits of privilege are.

24 As you've, I think, rightly noted, we do not want access
25 to and understand that we don't get access to privileged

1 communications. But there's a lot here that's not privileged.
2 And we know that because of the public things that Facebook has
3 said, including what the CEO has said.

4 And we'll figure out some categories that try and bring
5 this into focus for the Court.

6 **THE COURT:** I think that's the way to do it. And I
7 guess on Wednesday, you did get some -- about 10,000 pages,
8 and you can look at that and see if that helps.

9 But I do want to -- I don't think necessarily we should
10 wait to adjudicate it, but I do want to adjudicate it in a
11 context. And it'll be just one small piece, and that then
12 will, I think -- I've found, at least, that'll help with the
13 other, the other side. Okay, so that will be on your agenda to
14 discuss.

15 Okay. I do have a settlement at 9:30 so we have to -- I'm
16 going to be late for.

17 Let's see. Oh, the search terms. So the stipulation that
18 the parties signed said that Facebook was going to provide
19 search terms for a broad spectrum of custodians.

20 So tell me how Facebook has come up with that broad
21 spectrum of custodians that they will provide on July 21st.

22 **MS. KUTSCHER CLARK:** Sure, Your Honor. And, I think
23 the issue that was raised in the statement was a bit of a
24 misunderstanding. So I think we can resolve that easily.

25 The search term protocol provides a deadline to propose

1 search terms for each custodian. We divided the custodians
2 into eight groups. And what we said is we would propose a
3 comprehensive set of search terms by the 21st. But the
4 deadline to propose search terms for the first four groups is
5 also the 21st, with future deadlines for other groups.

6 The way we understood that is we'll be providing a
7 comprehensive set of search terms that will apply broadly next
8 week, but we're not proposing any terms that are specific to
9 custodians we have not yet interviewed, until the deadlines for
10 those custodians.

11 So the idea is there will be a comprehensive set of terms
12 for the first four groups that will include terms that are
13 specific to the custodians within those groups. So we talk to
14 those people, we learn jargon, we learned code names. We'll
15 include that sort of information. To the extent groups of
16 custodians were not interviewed, we're not going to have
17 specific terms for those people yet because we're still talking
18 to them.

19 **THE COURT:** But they will be included in the broader
20 search terms.

21 **MS. KUTSCHER CLARK:** I'm sorry; I just didn't
22 understand some of --

23 **THE COURT:** Sorry. But what you're saying is --
24 but -- but is the broader search terms will apply to them.
25 You just won't have the specific search terms.

1 **MS. KUTSCHER CLARK:** Yes, exactly.

2 And the one thing I do want to clarify, just to make sure
3 we're all on the same page, is there is one RFP, a single RFP
4 that is not covered by the first four groups of custodians.

5 So because we will not yet have spoken to any of the
6 custodians about the issues with that RFP, we did not intend to
7 propose a comprehensive set of search terms for that one
8 specific RFP. But otherwise, they will all be covered, in
9 addition to the specific terms for the first four groups.

10 **MS. WEAVER:** Which RFP is that?

11 **MS. KUTSCHER CLARK:** Don't hold me to this; off the
12 top of my head, I think it's 22. But I would need to look
13 again at my notes.

14 **MS. WEAVER:** Okay. This is the first we're learning
15 of it. But we're fine with that, Your Honor. The statement
16 did read as though they were limiting it to 41. We
17 understand, and I think you will understand the point.

18 **MS. KUTSCHER CLARK:** Yeah. I think it was just a
19 misunderstanding. We're happy to talk more about it.

20 **THE COURT:** Okay, great. What else should we talk
21 about?

22 **MS. WEAVER:** Your Honor, very briefly, just
23 43(b)(2)(C), I think you've seen kind of an example of the
24 crossing of ships in the night.

25 For example, you know, with regard to ADI, it has been

1 very hard for us to get our arms around what Facebook is
2 withholding. And we, for example, have told Facebook that we
3 will tell them if we are withholding anything, any categories
4 of documents that are responsive. And things got a little
5 flipped around.

6 I think we originally framed it as: Let us know if you
7 categorically object to any RFP. And they -- initially they
8 said yes, then they said -- the final response was only 19,
9 which is ADI.

10 But then when we dug in, and we started meeting and
11 conferring, it became unclear to us whether Facebook is taking
12 a position with regard to certain categories of documents that
13 are responsive. Meaning we're not objecting categorically to
14 an RFP, but are they withholding some small subset that is
15 responsive that they haven't identified to us because they're
16 saying no, that's not relevant? And the whole point of
17 34(b)(2)(C) is to make that transparent, so the parties can
18 engage.

19 And, and this is what we understand now, Facebook is
20 saying: Well, for search term documents, we're not ready yet.
21 And we understand that, and we will wait.

22 But we want to know now for categories of RFPs where
23 search terms are not required, has Facebook decided that there
24 are responsive materials which are not relevant? And we heard
25 some of it today. Some of it came out in their statement. But

1 that's the conversation that we want to have. And we think
2 we're entitled to that.

3 **MR. SNYDER:** Your Honor, just briefly, they raised
4 the same issue with Judge Chhabria with regard to our FTC
5 production. And Judge Chhabria ruled, clearly consistent with
6 the federal rules, that defendants, like all parties, are
7 presumed to conduct their relevance review in good faith and
8 are not required to make such disclosures which are not
9 required. That is to say, there's no requirement that we
10 identify irrelevant documents in advance.

11 We are going to. We've produced 1,200,000 pages of
12 documents, including, I think, 40- or 60,000 that are internal
13 Facebook documents, already. We will continue to produce
14 responsive relevant documents. The rules require that. We've
15 done it. And we don't have an obligation to say what is
16 irrelevant and not being produced. That's just backwards.
17 It's been rejected by Judge Chhabria. And really, we think,
18 you know, it makes no sense whatsoever.

19 **MS. WEAVER:** Well, we don't see -- go ahead.

20 **THE COURT:** I guess what -- for example, something
21 that's been produced are documents that were produced to the
22 FTC. Right?

23 And so --

24 **MR. SNYDER:** Yes.

25 **THE COURT:** -- one question is: Did you withhold

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

A handwritten signature in black ink that reads "Belle Ball". The script is cursive and fluid.

/s/ Belle Ball

Belle Ball, CSR 8785, CRR, RDR

Tuesday, July 14, 2020